

No. 15604

United States
Court of Appeals
for the Ninth Circuit

SAMACK, INC., a Corporation,

Appellant,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Corporation,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 22)

FILED

DEC 20 1957

PAUL B. HARRIS, CLERK

Appeal from the United States District Court for the
District of Oregon

No. 15604

**United States
Court of Appeals**
for the Ninth Circuit

SAMACK, INC., a Corporation,

Appellant,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Corporation,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 22)

**Appeal from the United States District Court for the
District of Oregon**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Attorneys, Names and Addresses of	1
Certificate of Clerk	17
Judgment Order	12
Motion for New Trial	15
Notice of Appeal	16
Order Denying Motion for New Trial	16
Pretrial Order	3
Statement of Points, Appellant's	20
Transcript of Proceedings	23
Instructions to the Jury	176

Witnesses:

Burton, Roy

—direct	94, 118
—cross	99

Clancy, Sherman E.

—direct	149
—cross	155

INDEX	PAGE
Witnesses—(Continued):	
Davis, Dr. Edward W.	
—direct	84
—cross	91
Hazelwood, William	
—direct	72
—cross	79
—redirect	81, 83
—recross	83
Noteboom, Donald H.	
—direct	24, 164
—cross	47, 165
—redirect	51
—recross	52
Ogden, E. B.	
—direct	157
—cross	160
Sadoff, Hyman A.	
—direct	101, 119
—cross	129
—redirect	132
—recross	135
Taylor, Harold L.	
—direct	56
—cross	67
—redirect	71

INDEX**PAGE****Witnesses—(Continued):****Teller, Dr. George (Deposition)**

—direct	103
—cross	109
—redirect	115
—recross	116

Woodworth, Larry Curtis

—direct	137
—cross	141
—redirect	148

NAMES AND ADDRESSES OF ATTORNEYS

VERGEER & SAMUELS,
DUANE VERGEER,
CHARLES S. CROOKHAM,
1027 East Burnside Street,
Portland 14, Oregon,
For Appellants.

JOHN GORDON GEARIN,
800 Pacific Building,
Portland 4, Oregon,
For Appellee.

In the United States District Court
for the District of Oregon

Civil No. 8508

CONVERSE TRUCKING SERVICE, a Corpora-
tion,

Plaintiff,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
Defendant and Third Party Plaintiff,

vs.

DONALD H. NOTEBOOM,

Third Party Defendant and Counterclaimant.

Civil No. 8834

SAMACK, INC., an Oregon Corporation,

Plaintiff,

THE HOME INSURANCE COMPANY, a New
York Corporation; and PHOENIX INSUR-
ANCE COMPANY, a Connecticut Corpora-
tion,

Intervening Plaintiffs,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO., a
Nevada Corporation,

Defendant.

PRETRIAL ORDER

The above causes came on regularly for pretrial
conference before the Honorable Gus J. Solomon

on Monday, February 25, 1957 (the parties having heretofore stipulated that the causes be consolidated for trial); Converse Trucking Service, Donald H. Noteboom and Samack, Inc., appeared by Charles H. Crookham; the intervening plaintiffs, The Home Insurance Company and Phoenix Insurance Company, appeared by Robert Clapperton and Irving Rand; defendant appeared by John Gordon Gearin.

The parties, with the approval of the Court, agree to the following

Statement of Facts

I.

Converse Trucking Service is a California corporation; Donald H. Noteboom and Samack, Inc., are residents of Oregon; The Home Insurance Company is a New York corporation; Phoenix Insurance Company is a Connecticut corporation; and defendant is a Nevada corporation.

II.

The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.

III.

On or about the 7th day of March, 1956, a collision occurred between a tractor and two trailers operated by Converse Trucking Service and a certain truck and trailer owned and operated by Pacific Intermountain Express Co. Said collision occurred on Oregon State Highway No. 58 near the Crescent Lake Junction, as a result of which the above

described motor vehicles received property damage and plaintiff Noteboom, received personal injuries.

IV.

Intervening plaintiff, The Home Insurance Company, on the 7th day of March, 1956, insured 50 per cent of the value of the aforesaid tractor owned by plaintiff, Samaek, Inc., against collision or upset for all damages in excess of \$1,000. Intervening plaintiff, Phoenix Insurance Company, on the 7th day of March, 1956, insured 50 per cent of the value of the aforesaid tractor owned by plaintiff, Samaek, Inc., against collision or upset for all damages in excess of \$1,000.

Following said collision each intervening plaintiff loaned to Samaek, Inc., the sum of \$2,384.73, with the understanding and agreement that Samaek, Inc., would repay said sums from, and only from, the recovery made by it from the party or parties legally responsible for said damage. As security for the said agreement of repayment plaintiff, Samaek, Inc., pledged to intervening plaintiffs its said claim for said damaged tractor against the defendant.

Contentions of Converse Trucking Service, Donald H. Noteboom and Samaek, Inc.

I.

That at the time of the occurrence of the accident as aforesaid, the equipment operated by Donald H. Noteboom consisted of a tractor and two trailers; that the tractor operated by Donald H. Noteboom was owned by Samaek, Inc., and was under lease

to and under the exclusive possession and control of Converse Trucking Service, and that Donald H. Noteboom was an agent and employee of the Converse Trucking Service; that the two trailers pulled by the aforesaid tractor were owned by Converse Trucking Service.

II.

That the sole and proximate cause of the collision between the vehicles operated by Donald H. Noteboom and the vehicle of Pacific Intermountain Express Co. was the carelessness, recklessness and negligence of Pacific Intermountain Express Co. in the operation of its vehicle in the following particulars:

a. In operating said vehicle at a high, dangerous and reckless rate of speed under the circumstances then and there existing;

b. In failing to maintain a proper lookout, and especially a lookout for the vehicle operated by Donald H. Noteboom;

c. In failing to yield one-half of the highway to the vehicle operated by Donald H. Noteboom;

d. In failing to drive as close as possible to the right edge of said highway;

e. In failing to have the vehicle under proper or any control.

III.

That as a proximate result of the negligence of Pacific Intermountain Express Co., these parties have been damaged as follows:

1. Converse Trucking Service has been damaged due to the foregoing to the extent of \$2,026.68.

2. Samack, Inc., has been damaged as a result of the foregoing to the extent of \$11,456.37.

3. That Donald H. Noteboom has been damaged as a result of the foregoing by suffering personal injury in that he sustained multiple contusions and abrasions of the body, laceration of the left knee and left elbow, acute sprain of the left ankle, laceration proximal to the metacarpal phalangeal joint between the ring and middle finger on the dorsum of the left hand; a concussion of the head, and required services of physicians and surgeons, and was generally damaged in the sum of Thirty-five Thousand Dollars (\$35,000.00) general damages, and has been unable to work for one month and sustained special damages for loss of wages for one month in the sum of Seven Hundred Fifty Dollars (\$750.00), and has incurred medical and hospital expenses and sustained special damages in the sum of Two Hundred Forty-one and 60/100 Dollars (\$241.60); that the injuries complained of as aforesaid are permanent.

* * *

Pacific Intermountain Express Co. denies the foregoing.

Stipulation as to Intervening Plaintiffs

The parties hereby stipulate that in the event of a verdict or the finding of the Court herein to the effect that Samack, Inc., is entitled to the recovery of any damages for injuries to said tractor that a

judgment in favor of the intervening plaintiffs and against the defendant shall be entered herein to the extent of said damages up to, but not exceeding the sum of \$4,769.46, and that the amount of said judgment in favor of the intervening plaintiffs shall be deducted from the award, if any, so made in favor of Samack, Inc.

Contentions of Pacific Intermountain Express Co.

I.

The accident to which reference has heretofore been made was caused proximately by the negligence of Donald H. Noteboom in the following particulars:

- a. He operated the tractor and two trailers at an excessive rate of speed;
- b. He failed to keep his rig under proper control;
- c. He failed to drive the rig on the right half of the highway;
- d. He failed to maintain proper lookout.

II.

As a proximate result of the foregoing negligence of Donald H. Noteboom, the truck and trailer of defendant were damaged and depreciated in value, and Pacific Intermountain Express Co. lost the use thereof, thereby suffering damage in the sum of \$1,501.52.

The foregoing contentions of Pacific Intermountain Express Co. are denied by Converse Trucking Service, Donald H. Noteboom and Samack, Inc., except they admit the amount of damages sustained by Pacific Intermountain Express Co.

Issues to Be Determined

1. Was defendant guilty of negligence in one or more of the particulars charged, and if so, was such negligence a proximate cause of the accident?

2. Was Donald H. Noteboom guilty of negligence in any particular as charged, and if so, was such negligence a proximate cause of the accident?

3. Was Samack, Inc., at the time and place of the accident legally responsible for the acts and conduct of Donald H. Noteboom?

4. What are the amount of damages sustained by (a) Converse Trucking Service; (b) Samack, Inc., and (c) Donald H. Noteboom, (d) Pacific Intermountain Express Co.?

Exhibits

The following exhibits have been identified, the parties agreeing that further identification is not necessary, but that objection to any of said exhibits shall be made only on the grounds of materiality, relevancy or competency:

I. Exhibits of Converse Trucking Service

- (1) Deposition of Sherman E. Clancy;
- (2) Repair estimate of Fruehauf Trailer Co.;
- (3) Photographs (a) through (), inclusive.

II. Exhibits of Samack, Inc.

- (9) Lease agreement with Converse Trucking Service;
- (10) Photographs (a) through (), inclusive;
- (11) Statement of truck expenses.

* * *

III. Exhibits of Donald H. Noteboom

- (17) Bill of Edward Davis, M.D.;
- (18) Bill of Drs. Rees, Haslinger, Nichols & Bline;
- (19) Deposition of Dr. George W. Teller.

* * *

IV. Exhibits of Pacific Intermountain Express Co.

- (22) Sealed exhibit for impeachment purposes only;
- (23) Photographs (a) through (1), inclusive;
- (24) Map;
- (25) Depositions of Donald H. Noteboom and Hy Sadoff;
- (26) Tachograph cards;
- (27) Driver's log;
- (28) Tractor service report;
- (29) Complaint—Converse Trucking Service vs. Pacific Intermountain Express Co.;
- (30) Complaint—Samack, Inc., vs. Pacific Intermountain Express Co.
- (31) Reserved for medical reports.

V. Exhibits of Home Insurance Company and
Phoenix Insurance Company

(32) Loan receipt of Home Insurance Com-
pany;

(33) Loan receipt of Phoenix Insurance Com-
pany.

It Is Hereby Ordered that the foregoing is the
Pretrial Order in the above-entitled cause, and that
it supersedes the pleadings which are hereby
amended to conform hereto, and that the Pretrial
Order shall not be amended, except by consent or
by Order of the Court to prevent manifest in-
justice.

March 20, 1957.

/s/ GUS J. SOLOMON,
U. S. District Judge.

The Foregoing Form of Pretrial Order Is
Hereby Approved:

/s/ C. S. CROOKHAM,
Of Attorneys for Converse Trucking Service, Sam-
ack, Inc., and Donald H. Noteboom.

/s/ ROBERT CLAPPERTON,
Of Attorneys for Intervening
Plaintiffs.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Pacific In-
termountain Express Co.

Lodged March 11, 1957.

[Endorsed]: Filed March 20, 1957.

In the United States District Court
for the District of Oregon

Civil No. 8834

SAMACK, INC., an Oregon Corporation,

Plaintiff,

THE HOME INSURANCE COMPANY, a New
York Corporation, and PHOENIX INSUR-
ANCE COMPANY, a Connecticut Corpora-
tion,

Intervening Plaintiffs,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Nevada Corporation,

Defendant.

JUDGMENT ORDER

The above-entitled cause came on regularly for trial before the undersigned Judge of the above-entitled Court and a jury on Wednesday, March 20, 1957, and continued until Thursday, March 21, 1957. Samack, Inc., appeared by Vergeer & Samuels, its attorneys; The Home Insurance Company and Phoenix Insurance Company appeared by Robert Clapperton, their attorneys and Pacific Intermountain Express Co. appeared by John Gordon Gearin, of its attorneys. A jury was duly empaneled and sworn, following which opening statements were made and evidence on behalf of all parties was in-

troduced. When all parties had rested and arguments to the jury were made, the Court with the consent of all parties submitted special interrogatories in the form of a verdict to the jury, which were answered by the jury as follows:

“We, the jury, answer the special interrogatories as follows:

“1. (a) Was Sherman E. Clancey, the driver of the Pacific Intermountain Express Co. truck and trailer, guilty of negligence?

“No.

“(b) Was Donald H. Noteboom guilty of negligence which caused or contributed to the accident?

“No.

“2. (a) Was Donald H. Noteboom, the driver of Converse Trucking Service truck and trailer, guilty of negligence?

“No.

“(b) Was Sherman E. Clancey guilty of negligence which caused or contributed to the accident?

“No.

“3. What damages did Donald H. Noteboom sustain by reason of the injuries he suffered in the accident?

“\$8,711.00.

“4. What damages did Samack, Inc., sustain?

“\$7,529.00.

“Dated this 21st day of March, 1957.

“VICTOR FERGUSON,
“Foreman.”

Said verdict was duly received and based thereon,
it is hereby

Ordered that Samack, Inc., The Home Insurance
Company, and Phoenix Insurance Company take
nothing by their complaints; and

It Is Further Ordered that Pacific Intermountain
Express Co. have judgment in its favor against
Samack, Inc., The Home Insurance Company, and
Phoenix Insurance Company.

Dated this 27th day of March, 1957.

/s/ GUS J. SOLOMON,
Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

MOTION

Come now Donald H. Noteboom, Samack, Inc., an Oregon Corporation, The Home Insurance Company, a New York Corporation and Phoenix Insurance Company, a Connecticut Corporation, and Converse Trucking Service, a corporation, and move the Court for an Order setting aside the judgment entered herein, and the findings of the jury with respect to the considerations of negligence submitted to it upon which said judgments are based, upon the following grounds:

I.

That the findings of the jury on the questions of liability submitted to it are inconsistent and are insufficient to support the judgment.

IRVING RAND,
ROBERT CLAPPERTON,
VERGEER & SAMUELS,

By /s/ DUANE VERGEER,
Of Attorneys for Converse Trucking Service,
Donald H. Noteboom and Samack, Inc.; The
Home Insurance Company and Phoenix Insurance Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 29, 1957.

[Title of District Court and Cause.]

ORDER

The motion of Samack, Inc., The Home Insurance Company, and Phoenix Insurance Company for new trial came on regularly to be heard before the undersigned Judge of the above-entitled Court on the 15th day of April, 1957. The said Samack, Inc., The Home Insurance Company, and Phoenix Insurance Company appeared by Duane Vergeer, of their attorneys, and Pacific Intermountain Express Co. appeared by John Gordon Gearin, of its attorneys. The Court having heard arguments of counsel and being fully advised:

Now Orders that the motion for new trial be, and it is hereby denied.

Dated this 15th day of April, 1957.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed April 19, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the District Court of the United States for the District of Oregon; The Home Insurance Company, a New York Corporation, and Phoenix Insurance Company, a Connecticut Corporation, Intervening Plaintiffs; Robert

Clapperton, Their Attorney; Pacific Intermountain Express Co., a Nevada Corporation, Defendant; and John Gordon Gearin, Its Attorney, Greetings:

You and each of you will please take notice that Samack, Inc., an Oregon corporation, the plaintiff in the above-entitled matter, does hereby give notice of appeal to the United States Court of Appeals for the Ninth Circuit from that certain judgment entered herein in favor of the defendant and against the plaintiff, et al.

Dated this 14th day of May, 1957.

VERGEER & SAMUELS,

By /s/ DUANE VERGEER,

Of Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 15, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Judgment order; Order denying motion for a new trial; Notice of appeal; Bond for costs on appeal and

Transcript of docket entries, together with the documents being forwarded in Civil 8508 which is consolidated with this cause, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8834, in which Samack, Inc., an Oregon corporation; The Home Insurance Company, a New York corporation, and Phoenix Insurance Company, a Connecticut corporation, are Plaintiffs; Intervening Plaintiffs and Appellants and Pacific Intermountain Express Co., a Nevada corporation, is the Defendant and Appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellants, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellants.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 18th day of June, 1957.

[Seal]

R. DeMOTT,
Clerk;

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15604. United States Court of Appeals for the Ninth Circuit. Samack, Inc., a Corporation, Appellant, vs. Pacific Intermountain Express Co., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed June 19, 1957.

Docketed June 26, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

The United States Court of Appeals
for the Ninth Circuit

No. 15604

SAMACK, INC., an Oregon Corporation,
Plaintiff-Appellant,

THE HOME INSURANCE COMPANY, a New
York Corporation; and PHOENIX INSUR-
ANCE COMPANY, a Connecticut Corporation,
Intervening Plaintiffs,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,
a Nevada Corporation,
Defendant-Appellee.

APPELLANT'S STATEMENT OF POINTS

Comes Now, Samack, Inc., an Oregon corporation, the Appellant herein, and presents the following as a Statement of Points upon which it intends to rely in its appeal of the above-entitled cause to the United States Court of Appeals for the Ninth Circuit:

I.

That the findings of the jury on the questions of liability submitted to it are inconsistent and are insufficient to support the several judgments.

Dated this 24th day of June, 1957.

VERGEER & SAMUELS,

By /s/ C. S. CROOKHAM,

Of Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 26, 1957.

